BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference to the official report of the opinion in the court below, grounds on which the jurisdiction of this court is invoked, statement of the case, and the questions presented are set forth in the petition.

Argument.

The trial judge who heard and decided the merits of the plaintiff's case filed a memorandum of his findings which appears in the record submitted herewith. (Record, p. 32.)

The findings disclose that the real intention of the parties in the conception of the liquidation plan was to pay all depositors and general creditors in full. (Record, p. 41, Ex. 3.)

The trial judge found that the resolutions authorizing the voluntary liquidation and all instruments effectuating the transaction were dictated by the Corporation, and that the resolutions provided "that it was desired to protect . . . depositors and creditors against additional losses which would be sustained in the event of forced liquidation of its investments and to provide for the full payment of its [the Bank's] obligations to depositors and creditors." (Record, p. 33.)

These findings further state that when the liquidation transactions were accomplished "and at all times prior thereto while plans directed to their accomplishment were being discussed and executed it was the intention of the Bank and its Officers to satisfy all outstanding obligations to general creditors and depositors alike." This was the intention which was later dictated by the Corporation in the resolutions of the directors of the Bank authorizing the liquidation. (Record, pp. 33, 41, Ex. 3.)

Therefore it is established that at the time of the conception of the liquidation plan ending in the dictation of

the resolution by the Corporation and the accomplishment of the plan all creditors and depositors were to be paid and it is significant as bearing upon this intention that these resolutions were never later altered showing any other purpose or intention. (Record, p. 41, Ex. 3.)

In pursuance of the liquidation plan as finally consummated, and as evidenced by the exhibits which are a part of this record, and after their execution, the Corporation provided for the payment in full of all depositors and creditors, except the plaintiff; and the trial judge states that, if it is permissible for him to do so, he draws the inference that the plaintiff's claim was the only one for which provision was not made. (Record, p. 35.)

As matter of fact, the record discloses that the Corporation, in pursuance of the plan, paid to depositors approximately $270,000 more than it would have been obliged to pay under the law as it was originally, section 12 B of the Federal Reserve Act, before the amendment of 1938, subsec. (*n*) (4).

The findings also set forth that all other creditors were paid in full, provision being made therefor by the Corporation, which set up a fund which was expended by the liquidator of the Corporation, "to take care of contingent and unliquidated claims that were pending against the Bank . . . claims anticipated but the amounts of which were uncertain. It was not a fund provided to take care of this plaintiff." (Record, p. 35.)

If, as has been clearly shown, it was the intention of the parties to pay everybody, it is natural to inquire why provision was not made to pay the plaintiff.

The plaintiff's claim was, of course, well known to the Bank, who brought it to the attention of the Corporation. But the Bank, because of information it had received from its counsel, was under the impression that the plaintiff's case had no merit and that ultimately it would result in

judgment for the Bank. The Bank's officials misinterpreted counsel's advice, so that "actually they believed that the plaintiff's case had been concluded, that it was dead and was no longer before the court." (Record, p. 34.) The Corporation "by the exercise of reasonable care and diligence should have known of the status of the plaintiff's claim for a reasonable period of time prior to December 3, 1938," the date it dictated the resolutions authorizing the liquidation, and the trial judge so finds; and it did not take any of the necessary steps set forth by the trial judge to carefully evaluate the claim, but adopted the erroneous conclusion of the Bank relative to the claim. (Record, pp. 35-36.)

Therefore the plaintiff's claim, the existence of which was well known to the parties, *was not included in the list of creditors and was not paid.*

It is remarkable to note that the trial judge states that "it is fair to assume that if it had been appreciated, by any of the parties to the agreement of December 3, 1938, between the Bank and the Corporation, that the plaintiff's claim was outstanding and as meritorious as later it was determined to be, provision would have been made to take care of it." (Record, pp. 34-35.)

It is submitted that the plaintiff has now conclusively shown by the findings of the trial judge that the plan of liquidation was predicated upon the payment in full of all depositors and creditors; that this included the plaintiff, if it was a creditor; that this intention and purpose never changed; that the failure to include the plaintiff and to provide for it in the liquidation plan was due to mistake, misconception and error on the part of the Bank and the Corporation; and that the failure to include the plaintiff's claim was not because the parties did not intend to obligate themselves to pay the claim, as is inferred by the decision of the Supreme Judicial Court of Massachusetts, but only because they wrongfully concluded that the claim was not

then a "living one." Therefore there could not have been an intentional exclusion of the plaintiff, a creditor of the Bank, as it was erroneously thought that the plaintiff was not a creditor; and had it been a creditor in the minds of the parties, the trial judge found that provision would have been made to pay it. (Record, pp. 34-35.)

In many respects the situation here presented parallels that in *Forbes* v. *Thorpe,* 209 Mass. 570, 581, 582, in which a creditor's rights were enforced under an agreement made for his benefit. In that case there were wilful misrepresentations and in the present case misconception, mistake, error or carelessness. The end result is the same.

The Supreme Judicial Court of Massachusetts decides (Record, p. 61) that there was nothing ambiguous about the contract and that a court cannot read into a contract an obligation that was not assumed. But the plaintiff submits that this is not the analogy to control its contentions. If it was meant to include the plaintiff as a creditor and it was not included due to mistake, error, carelessness or inadvertence, equity should do that which was intended and which should have been done. It seems hardly necessary to assert that equity has the power to reform a contract or correct a mistake, and it seems plain that this is the kind of case where such a power should be exercised, having in mind the findings of fact by the trial judge, and the peculiar nature of the transaction.

The Supreme Judicial Court of Massachusetts also decides that when the liquidation contract was entered into it contained no provision for the payment of creditors. However, the fund of $10,000, earlier referred to, and set forth in Exhibit 4, was set up by the Corporation as part of the plan and was meant "to take care of contingent and unliquidated claims that were pending against the Bank on December 3, 1938," the date of the start of the liquidation. It is thus made plain that there were no other creditors

than those provided for by this fund, as the plaintiff was, erroneously, not so considered; and there was therefore no need to mention creditors or provide for them in the contract, creditors and depositors having been provided for before or simultaneous with the execution of the contract.

It is apparent that the parties believed the only real creditors were depositors who were fully provided for in the plan of liquidation.

So the fact that creditors are not mentioned in the contract is of no significance. Had the plaintiff been recognized as a creditor, it would not have necessarily been named in the contract, but in the list of creditors submitted by the Bank as part of its application for the loan and provision otherwise would have been made for it as was done for depositors and other minor creditors who were paid in full, and whose names also do not appear in the contract between the Corporation and the Bank.

The decision of the Supreme Judicial Court of Massachusetts holds in effect that, because the contract between the Bank and the Corporation was not ambiguous, despite the findings of the trial judge the plaintiff has no rights. (Record, p. 61.)

It seems to the plaintiff the decision is against the plaintiff on the sole ground that the transaction was the ordinary bargain and sale, borrower and lender, common-law transaction, which, of course, is not the case, since the money at no time found its way into the controlling possession of the borrower. On the contrary, its disposition and travel had been arranged for by the Corporation prior to the execution of the liquidation contract, and the proceeds of the loan were turned over to another bank to distribute to depositors and minor creditors simultaneously with their receipt from the Corporation, the transfer being but a matter of bookkeeping. (Record, p. 32.)

Had this been the well-recognized borrower and lender transaction, the borrower would have obtained actual possession of the funds, which would then have been available to all creditors for distribution or to reach and apply or the funds would have been ratably distributed to all creditors, if they were insufficient to pay them in full; and the funds would have become trust funds held for the primary benefit of creditors and shareholders.

Peters v. *First National Bank of New London,*
259 N.W. 600, 218 Wis. 126.
George v. *Wallace,* 135 Fed. 286, 292.

It is the contention of the plaintiff that the nature of the transaction in and of itself contemplates a payment out of the assets to all creditors and depositors, because the Bank was solvent and entered into a voluntary liquidation. The Corporation before it entered into the transaction was satisfied of the Bank's solvency, as the record discloses, and was content to take all of its assets or control them after fully acquainting itself with the financial condition of the Bank. If this were not so, the Corporation could at any time take over all the assets of an insured bank, under the guise of solvency, and subsequently, by means of written instruments, exclude creditors from payment of their claims, as in this case, which if they had been included originally might have caused the bank to be insolvent, with consequent receivership as provided by the National Banking Act, entitling the creditor to at least a pro-rata participation in the assets of the bank.

This is practically the situation in the present case, as the plaintiff's claim has not been paid and it is uncertain, if it had been paid, whether the Bank would have been made insolvent, as the value of remaining assets are but book values and they may never produce sufficient actual

proceeds to pay the plaintiff's claim after the satisfaction of the Corporation's loan and liquidation expenses.

In other words, the plaintiff says that a solvent bank which desires to go into voluntary liquidation should be forced to arrange to pay all of its depositors and creditors before being permitted to enter into voluntary liquidation. Otherwise it seems only fair and equitable that it should either keep its doors open or go into receivership as a closed bank and permit creditors to share pro rata in its assets.

> *Merchants National Bank* v. *National Bank of Lillington,* 231 Fed. 556, 558.

The Act of Congress, June 3, 1864, permitting the organization of national banks, intended to secure equality among general creditors in the division of proceeds of the property of the Bank.

> *Steele* v. *Randall,* 19 F. (2d) 40.

And section 12 B of the Federal Reserve Act, as amended, has not in any way changed this doctrine.

On the plaintiff's contention that the Corporation subordinated its rights, in fact, the Supreme Judicial Court of Massachusetts in its decision ignores all of the acts of the Corporation as found by the trial judge and which, it is submitted, show an actual subordination. (Record, p. 62.)

But the plaintiff urges that it is not a question of the interpretation of the contract as it was written which should govern the plaintiff's rights, but the intentions of the parties which were not carried out, due to error and mistake; and it submits that the Corporation's intention to subordinate its rights under the contract is definitely shown by its actions and its conduct generally as found by the trial judge, not the least of which was the voluntary

assumption of the defense of the plaintiff's original case in March of 1939, approximately three months after the liquidation was authorized. Counsel for the Bank no longer participated in the defense of the action after the appearance of counsel for the Corporation. (Record, p. 36.) Subordination is further factually shown by the finding that all depositors and all other recognized creditors were paid in full, so that, so far as the parties to the contract were concerned, when this had been done, the Bank had paid everybody who had a claim against it, which is exactly what the parties intended when the Bank divested itself of all of its assets.

Visualizing the situation at the time of the negotiations leading up to the resolve to liquidate dictated by the Corporation, and at the time of the execution of the contracts, it is not difficult to understand what was sought to be accomplished.

The Corporation was fully informed of all of the Bank's liabilities and assets. The Bank wanted to pay all creditors and depositors in full. It did not want to exclude anybody. The Corporation agreed that there were abundant assets to accomplish this purpose. Therefore the parties agreed that when the loan was made it would be in an amount sufficient to pay any and all claims against the Bank. The loan was made and all of the assets transferred.

Upon this happening the Bank was supposed to be freed of all liabilities of every nature whatsoever and its assets in their entirety had been pledged as collateral security to secure this accomplishment. That this collateral was determined by the parties to be more than sufficient for the desired purpose is found by the trial judge, who states that the book value of the equity of redemption "exceeds the amount of the loan by more than $500,000.00." (Record, p. 36.)

However, as further protection for the Corporation and as further convincing indication that all liabilities were to be paid out of the assets is the admission in the answer of the Corporation filed in the present case that it also took from the Bank an assignment of all claims, actions and choses in action that the Bank had against its officers and directors for damages caused the Bank by their negligent acts, and the further admission that this assignment included any action against said officers and directors for causing the damage to the plaintiff for which it later recovered judgment. (Record, p. 15.)

So the Corporation, having convinced itself beyond any doubt that all obligations of the Bank of every nature and description had been fully provided for, then executed with the Bank *the only kind of instrument which was called for under the then circumstances,* namely, a collateral note agreement pledging all of the assets of the Bank as security for the loan. (Record, p. 50, Ex. 4.)

Is it not then obvious that, had the parties properly appreciated the plaintiff's claim *which was then outstanding and pending trial,* and which the trial judge found as a fact was disregarded and overlooked through error, some provision would have been made to treat the plaintiff as the others were treated, either by setting up a reserve against the contingency of a judgment being rendered in favor of the plaintiff, the ad damnum of plaintiff's writ having been $100,000, or by increasing the $10,000 fund which had been set up to take care of unliquidated and contingent claims, which fund was made an integral part of the liquidation plan although its creation was not provided for in the written contract?

The Supreme Judicial Court of Massachusetts virtually decides that there was an intentional exclusion of the plaintiff from the contract, and therefore from the liquidation plan. (Record, pp. 60-61.)

If this is so, does it not seem reasonable and probable that at some stage of the negotiations, in some instrument or by some notation, the Corporation would have in some manner indicated its unwillingness to treat the plaintiff's claim on a parity with the others?

And there is nothing in any record of the liquidation transaction to indicate any such intention; but there is positive evidence showing why the plaintiff's claim was "overlooked." (Record, p. 35.)

In view of all the foregoing, how can the decision of the Supreme Judicial Court of Massachusetts, which virtually holds that, because the plaintiff was not mentioned in the loan contract, it was intentionally excluded, or how can it logically and reasonably be found that the plaintiff ever should have been named therein had its claim been intelligently considered, in view of the manner in which all other claims were provided for and the general plan of liquidation.

And, furthermore, how can a decision which deprives the plaintiff of its right to participate in parity with other creditors in a voluntary liquidation of a national bank, on the sole ground that the final loan contract intentionally made no provision for the claim and that the plaintiff was not a party to the contract, be sustained, especially when it disregards and ignores the compelling facts showing the nature of the transaction and the intention of the parties as clearly evidenced by the record, and that the only reason the plaintiff was not provided for was because of mistake, error or carelessness? (Record, pp. 33, 34, 35.)

To permit the situation which presently confronts this plaintiff to obtain is to open wide the doors to unlawful preference, discrimination and even fraud, and to defeat the very purposes of the Federal Deposit Insurance Act, in that it would enable the Corporation, in order to reduce its risk or avert a threatened loss, to compel any insured

bank to adopt such terms and conditions as the Corporation may determine under the powers given it by subsection (*n*) (4) of the Act, and situated as the parties were in the present case, would enable the Corporation to discriminate against one or any number of creditors, either deliberately or for any other reason which to it seemed sufficient, thus denying to the creditor, as was done in the present case, his rights to an interest in property in parity with other general creditors of a solvent national bank in voluntary liquidation, in violation of the rights guaranteed him by the due process clause of the Constitution of the United States, Amendment XIV, sec. 1.

But in any event and notwithstanding what the corporation could have done, it did make the loan upon such terms and conditions as it determined, as the act permitted it to do, and the evidence convincingly shows that these terms and conditions contemplated the payment of all liabilities of the bank of every nature and description without any exception or reservation, which would necessarily have included provision for the plaintiff but for error, mistake or negligence.

Regardless of the beneficent character of the corporation, created by Congress mainly for the purpose of instilling confidence in our banking institutions, it is submitted that the Supreme Judicial Court of Massachusetts erred in its decision that the plaintiff's plight, caused through error, mistake or negligence, cannot be remedied or its rights restored under the fundamental laws of equity jurisprudence, and therefore the plaintiff submits its decision should be reversed and an appropriate decree caused to be entered giving the plaintiff the relief prayed for.

ARTHUR V. GETCHELL,
WILLIAM G. TODD,
WILLIAM HERBITS,
Attorneys for Petitioner.